

# The Polish Crisis as a European Crisis: A Letter to Mr Jean-Claude Juncker

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THE EUROPEAN ECONOMIC COMMUNITY IS A COMMUNITY BASED ON THE RULE OF LAW, INASMUCH AS NEITHER ITS MEMBER STATES NOR ITS INSTITUTIONS CAN AVOID A REVIEW OF THE QUESTION WHETHER THE MEASURES ADOPTED BY THEM ARE IN CONFORMITY WITH THE BASIC CONSTITUTIONAL CHARTER, THE TREATY.

Case 294/83, Parti écologiste "Les Verts" v European Parliament, para 23

My letter is not fueled by anger. Far from it. If there is one emotion that drives it, it is the deep disappointment at how easily your Commission has given up on Poland, despite all the fanfare and tough legal talk to the contrary. The time has finally come to recognise that by doing nothing, you have been losing Poland every day for the last year or so. Your miscalculated waiting on the sidelines, talking to the perpetrators and hoping for their change of heart, rather than stopping them in their tracks, only emboldened the unconstitutional capture. There is one aspect in which you have excelled, though. It is the precious time you have given to Polish authoritarians to help them grow in confidence and consolidate their power. The monster of authoritarianism that you face right now on your doorsteps is grateful for your patience, permissiveness and naiveté.

The latest attacks, which aim to totally subjugate the Polish judiciary to the will of the Polish ruling party, coupled with the blatant disregard for the authority of the rulings of the Court of Justice, follow on the unlawful capture of the [Polish Constitutional Court](#) last December. With no independent constitutional court left to guarantee any effective compliance with the national constitution, the ruling Law and Justice Party (PIS) is engaged in a multi-pronged take over of the national judiciary. The law on the ordinary courts had already entered into force and effectively brought the courts under the „tutelage” of the Ministry of Justice. The draft [Law on the Supreme Court](#) delivers now on the promise of „taking care” of the Supreme Court. The capture of the state and its institutions goes on ...

However, it is not my intention here to go yet again over the legalistic analysis of dry paragraphs as this has already been done on numerous occasions. I have no doubt that you are perfectly aware of all the legal talk and arguments. Rather, I would like to call out you and your Commission for lack of direction, vision and decisiveness, stalling for time and [sending incoherent messages](#) and, as a result, letting off the hook yet another government that makes mockery of the values on which the EU is founded. What's at stake is not simply the public image of your institution, but rather long-term viability of the „ever closer union among the peoples of Europe”.

Poland has led the Commission by the nose for some time. Yet to fully grasp the long term consequences of your inaction and understand what's next and how Poland's ruling party is seeking to achieve its autocratic takeover of the Polish state, one must look at the Hungarian “precedent”. As soon as Orbán's Fidesz party had come to power in 2010, a [methodical campaign](#) to destroy the independence of the judiciary and capture state institutions and the media began. The ultimate goal was to establish a majoritarian one-party autocracy which would never have to fear subsequent elections as these would no longer be free and fair. Sadly, this strategy has largely worked, with the European Commission failing for the most part to comprehend what was happening. As for national governments, they have been either in denial, happy to hide behind the Commission, or have simply chosen to look the other way.

When analysed together, the cases of Hungary and Poland suggest a new worrying pattern of constitutional democracies. Following the excellent analysis by [Kim Lane Scheppele and Laurent Pech](#), one may even speak of a recipe for constitutional capture in one state after another. This process tends to result in a systemic undermining of the key components of the rule of law such as independent and impartial courts, free media, and

sealing off the public space for free exchange of ideas and world views. As K.L. Scheppele and L. Pech convincingly point out, this process follows a well-organised script and tends to begin with disgruntled citizens voting to break the system by electing a leader who promises radical change, often referring to the 'will of the people' while trashing the pre-existing constitutional framework with cleverly crafted legalistic blueprints borrowed from other 'successful' autocrats. Constitutional capture travels not only in space, but also in time.

One would have hoped that the European Commission has learnt from its past dealings with Hungary. Sadly, the Commission is making the same mistakes with Poland. The Commission is once again displaying the same naïve belief in the virtues of dialoguing with autocrats giving all the time they need to subvert the national constitutional order. With each passing day, the capture takes roots and becomes more and more entrenched. Knowing all too well that Europe will do nothing, the Polish ruling party did not even hide its true intentions in July this year when it sought to subvert the Supreme Court and the judiciary with rushed legislation. New draft legislation on the Supreme Court picks up exactly where the first draft left off. This is how capture works. One step back, two forward. The tempo might change, but the process never stops until the capture is complete.

Based on what has happened in Hungary and in line with the logic of constitutional capture, one can now expect the Polish ruling party to prioritise the rewriting of the electoral rules as soon as the planned purge of the judiciary is completed. And indeed the [electoral meddling](#) has just begun. The next step is a new constitution in 2018 that will deeply entrench the rule of PIS and regularise *a posteriori* the multiple violations of the current constitution by Polish authorities. We have already seen how this worked perfectly in the context of the debacle of the Polish Constitutional Court. Brussels was sending polite questions, setting new deadlines, asking for explanations, while PIS has been busy capturing the Court. Everybody but your Commission could see through this game of „catch me if you can”.

Therefore, the time has come for the Commission (and other institutions for that matter) to end the dialogue charade with the authoritarians and for national governments to take a stand. Europe has been juggling multiple crises in recent years, so that the internal affairs of one rogue government or two may seem less critical to Europe's future than crises that affect multiple states at the same time, like the euro-crisis or the refugee crisis. But the proliferation of governments inside the EU that no longer share basic European values undermines the basic assumption that we continue to be ready to live together. The Commission and the EU are running out of excuses to justify their lack of meaningful action. They should know by now with whom they are dealing, plan its actions accordingly and, most of all, reject any short-term sweeteners and dishonest assurances from the Polish government. The time for futile exchanges of letters, memoranda, grand words etc., have passed. The situation in Poland should be considered a European problem and a rallying cry for finally taking Europe's values seriously. By showing that liberalism and democracy no longer animate national constitutions and politics, and by revealing that illiberal states can now flourish within the EU, the democratic backsliding in Poland and some of the member states poses an existential challenge to the EU.

All this leads to important questions that must no longer be swept under the rug. Can the EU mount a response to the challenge? Is the EU still able to foster respect for commitments of principles that brought member states together? Does it have a safety valve by which it can deflate excessive nationalism and manifestly illiberal practices? Can it preserve the common values that launched the European project – supranationalism? At this point all these questions receive a negative answer to the dismay of many in my country that were pinning their hopes on Europe's resolve to defend the values on which the EU is allegedly built.

Of course, we Poles know that at the end of line the recapture of our state and constitutional heavy lifting will be on us. Yet even a little support from the EU would help. One simple „*symbolic act of defiance*” from your institution would mean more than a thousand words. It would reinforce our conviction that Europe has not yet forgotten about Poland ...

The most dramatic question of all then recurs. What else must happen for your Commission to finally do something tangible that would justify the proud tag of the „*Guardian of the Treaties*” ? Often, the explanation given for the Commission's lack of meaningful action, was a lack of consensus within the Council. With all due respect, this is a deflating and self – defeating argument. The question whether the Commission might ultimately fail in its pursuit of the procedure of [art. 7 of the TEU](#) is misplaced here and leads

the entire rule of law mechanism astray. The short answer to this question would be „*probably yes*“, but fear of failure should never be the most important concern in triggering art. 7 of the EU Treaty, at least not for the Commission. The Commission has its own fidelities and commitments to the Treaties and the European rule of law. For the Commission to make the exercise of its own Treaty competences subject to future and uncertain behaviour of other institutions stands for an [embarrassing abdication](#) of its own duties under the Treaties. Triggering an art. 7 procedure would at least put the ball in the Council's court and leave an important legacy: „*a symbolic jurisprudence of defiance*“ in the face of authoritarian governments riding roughshod over the very foundations of the EU.

When will your institutions finally understand that your inaction strikes a deadly blow at the core of European law and only emboldens the would-be authoritarians? They will be inclined, now more than ever, to follow the path of capture knowing that the Commission is weak and subjects its competence to ensure the observance of EU legality to how other institutions exercise their powers! This turns the entire system of legal protection in the EU on its head. We have seen the dramatic consequences of your misplaced tactics of appeasement in the Court of Justice in [the logging case](#). Clearly, the blatant and arrogant rejection by PIS of the Court's [interim injunction](#) could be traced back to your non-commitment and the strategy of „*all words and no action*“. PIS is learning fast and knows now all the ins and outs of playing this waiting game with you. As a result, true enforcement of commitments lose their credibility and the Commission's stature lies in tatters.

If all the above is not enough for you, then the EU and the legitimacy of your institution are indeed in trouble as there is never a quick fix for lack of political imagination and leadership. If the last two years have taught us anything, it is that the Commission has lost the spirit of European integration and betrayed the foundational ideals of the rule of law and constrained democracy in the spirit of „*never again constitutionalism*“.

Rome has been burnt while you fiddled. I have even serious doubts whether you realise all this and are able to appreciate from the safe distance of Brussels the tragic consequences of your failed politics and calculations. For starters, if you need a guiding star to regain the sense of direction and steady your ship, I am happy to make one suggestion, all while knowing that this might be way too late. Simply read *Les Verts* and remind yourself that in the community of law *politia legibus, non leges politiae adaptandae*, or, *it is always the politics that must adapt to the laws, not the other way around*. Sometimes going back to the basics might help ... And while doing so, please never forget to „*tread softly because your tread on my dreams*“ (W. B. Yates, *He Wishes for the Cloths of Heaven*).

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